Supreme Court, U.S.
FILED
OCT 14 1993
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(2)

No. 93-427

In The

Supreme Court of the United States

October Term, 1993

JANET G. CLOWES,

Petitioner,

v.

ALLEGHENY VALLEY HOSPITAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 15

I. THIS CASE DOES NOT PRESENT A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE PROPER STANDARD OF APPELLATE REVIEW FOR FINDINGS OF CONSTRUCTIVE DISCHARGE 16

A. The Unamended Preliminary Opinion Of The Third Circuit Has No Precedential Value 17

B. In Other Published Decisions, The Third Circuit Court Of Appeals Has Applied The Standard Of Review That Petitioner Urges Upon This Court 19

II. THE COURT OF APPEALS' DECISION DID NOT DEPRIVE CLOWES OF HER SEVENTH AMENDMENT RIGHT TO A JURY TRIAL 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).....16, 20

Cortes v. Maxus Exploration Corp., 977 F.2d 195 (5th Cir. 1992) 16, 20

Cozzola v. Codman & Shurtleff, Inc., 751 F.2d 53 (1st Cir. 1984) 16

EEOC v. Delight Wholesale Co., 973 F. 2d 664 (8th Cir. 1992) 16

Galloway v. United States, 319 U.S. 372 (1943)..... 21

Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984) 20, 22

Gray v. York Newspapers, Inc., 957 F.2d 1070 (3d Cir. 1992)..... 22

Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990)..... 16

Levendos v. Stern Entertainment, Inc., 909 F.2d 747 (3d Cir. 1990) 20

Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983)..... 16

U.S. v. Turley, 891 F.2d 57 (3d Cir. 1990) 18

Wardwell v. School Board, 786 F.2d 1554 (11th Cir. 1986)..... 17

Watson v. Nationwide Insurance Co., 823 F.2d 360 (9th Cir. 1987)..... 16

Wheeler v. Southland Corp., 875 F.2d 1246 (6th Cir. 1989)..... 20

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) 20

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1990) 1, 13, 15

Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 5 18

Internal Operating Procedure of the United States Court of Appeals for the Third Circuit, Chapter 9 20

Opinions Announced June 28, 1993, 61 U.S.L.W. 4795 (June 28, 1993) 19

Petitioner Janet G. Clowes (hereinafter "Clowes") has petitioned the Court seeking a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. The court of appeals held that there was insufficient evidence as a matter of law that Clowes had been "constructively discharged" by the Respondent, Allegheny Valley Hospital[1] (hereinafter "Allegheny Valley Hospital" or the "Hospital"), because of her age in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (1990) (hereinafter "ADEA"). The basis for Clowes' petition is an alleged split between the circuit courts of appeal as to the applicable standard of review for trial court findings of constructive discharge. The Hospital opposes the petition for certiorari because, contrary to Clowes' argument, this case presents no split among the circuits and because the Third Circuit properly reviewed the judgment of the district court.

COUNTER-STATEMENT OF THE CASE

Clowes commenced this action against Allegheny Valley Hospital in the United States District Court for the Western District of Pennsylvania on September 1, 1989. The case was tried to a jury before U.S. District Judge Alan N. Bloch from October 22 through October 30, 1991.

[1] Allegheny Valley Hospital is a wholly-owned subsidiary of Allegheny Valley Health System, Inc. Allegheny Valley Health System, Inc. also owns two other subsidiary corporations: Allegheny Valley Hospital Foundation, Inc. and Valley Development and Management Corp.

At trial, it was not disputed that Allegheny Valley Hospital neither formally terminated Clowes' employment nor asked her to resign. (R. 335A-336A)[2] Rather, Clowes voluntarily resigned from her full-time position with the Hospital and transferred to temporary part-time status on November 20, 1987. (R. 482A) At the time of her transfer, Clowes was age 54. (R. 137A) Since Clowes was never actually discharged, her only hope for establishing an ADEA violation was to prove at trial that she had been "constructively discharged" by showing that because of Clowes' age the Hospital knowingly made her working conditions so unpleasant or difficult that a reasonable employee in her shoes would have resigned. Much of the evidence presented on this issue was undisputed.

Clowes began her employment for Allegheny Valley Hospital as a staff nurse on July 5, 1957. The Hospital is a non-profit, acute care facility located in Natrona Heights, Pennsylvania. The Hospital's facilities include 307 licensed adult beds. (R. 463A) The Hospital provides a broad range of medical services, including an emergency department, intensive care, cardiac care, operating rooms, labor and delivery, as well as areas for general diagnosis and treatment. (R. 464A)

Between 1957 and 1985, Clowes worked in a variety of positions in the Hospital, sometimes on a part-time basis. (R. 141A, 146A, 149-150A) Effective July 26, 1985, Clowes left her full-time employment at the Hospital to

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[2] References to the Appendix reproduced for the Third Circuit are designated as "(R. ___A);" References to the Appendix included with Clowes' Petition for Certiorari are indicated as "(___a)".

accept a position as a Home Health Care nurse for another employer. While at Home Health Care, Clowes remained on temporary part-time status at the Hospital. (R. 150A-152A)

On March 10, 1986, Clowes returned to full-time status as a staff nurse in the Hospital's Progressive Care Unit ("PCU"). When Clowes became a staff nurse in PCU in 1986, her head nurse, Ann McCutcheon, noted problems with her performance. (R. 721A-723A) On two separate occasions, on October 1, 1986 and on December 23, 1986, Clowes failed to count narcotics at the end of her shift, a basic but important nursing responsibility. (R. 721A) Clowes was given a verbal warning after the October 1, 1986 incident. On December 23, 1986, a written warning was issued to Clowes for her repeat serious omission in her duties. (R. 721A-723A, 1025A)

On March 31, 1987, Clowes requested and was granted a transfer to the IV Team as a general staff nurse. The IV Team was a new experience for Clowes. Unlike traditional nursing, where a nurse is responsible for general nursing care of a set number of patients on a single nursing unit, IV Team members are responsible for administering and monitoring intake of medications by intravenous means for patients throughout the Hospital. (R. 483A) Thus, the IV Team nurse must perform highly specialized medical procedures on approximately 50 patients throughout the day. (R. 863A)

At the time of Clowes' transfer, the supervisor of the IV Team was Diana Bennett Malloy. (R. 47A-48A) While Nurse Malloy was less than 40 years of age, seven of the other ten nurses of the IV Team were older than 40 years

of age. (R. 48A, 347A-349A) Other than Clowes, none of these older nurses complained about Malloy's supervision or alleged that she was biased against older workers.

Indeed, there was no evidence presented that Nurse Malloy, or any other Hospital supervisor, *ever* mentioned Clowes' age. Rather, much of the evidence at trial concerned Clowes' performance as a member of the IV Team. Significantly, at no time during trial did Clowes offer any evidence that the performance shortcomings noted below, which served as the basis for Nurse Malloy's evaluations and counselings, were false or unworthy of credence. The evidence of Clowes' performance problems, thus, stood unrebutted.

In Clowes' written orientation evaluation, which covered the period from her starting date with the IV Team until April 16, 1987, she received the lowest possible rating in setting priorities and planning for patient needs. (R. 1015A) Although in many areas Clowes' IV Team performance was deemed acceptable, she exhibited difficulty in setting priorities and in delegating her duties. (R. 1015A) Specifically, when an unanticipated event, such as an emergency, required Clowes' attention, she experienced an inability to deal with the situation and to adapt her schedule to meet the demands of her IV Team assignments. (R. 1015A)

After completing her orientation to the IV Team in April, 1987, and after receiving the above evaluation, Clowes' performance problems continued. Specifically,

Clowes had difficulty accurately completing the documentation required on IV patients. (R. 1059A) She consistently failed to write dates, diagnoses and allergies on IV patient profiles. (R. 1059A)

IV patient profiles require basic, objective information, such as the date and type of medication administered, the date medication is discontinued, and the nurse's initials. (R. 182A) Other nurses and medical personnel rely on this information for their care of a patient on IV therapy. (R. 183A) Clowes consistently failed to perform even these straightforward requirements of documentation. (R. 1059A) Also, Clowes failed to document required information on the patients' catheter site where the IV is inserted. (R. 1059A) IV patients are often among the most critically ill and this catheter site information could be vital in an emergency. Clowes' failure to document properly was clearly noted on her July, 1987 performance evaluation. (R. 840A, 1059A)

While noting Clowes' continuing documentation difficulties, Clowes' July, 1987 performance evaluation was, by and large, satisfactory and Nurse Malloy recommended that Clowes receive an increase in salary. In fact, Clowes was given a satisfactory or better rating in 28 of 35 performance categories and was given the *highest possible rating* in ten of the categories. (R. 841A, 1059A-1063A) Thus, in this *otherwise satisfactory* evaluation by Nurse Malloy, it was noted that Clowes demonstrated a continued inability to correct her problem with documentation of patient information and to set priorities so that patients would be cared for in a prompt and efficient manner. (R. 840A-843A, 1059A)

As noted on the July, 1987 evaluation, if an employee is given a rating of 2 or less in a category, under established Hospital procedure, there is a follow-up meeting required between the employee and her supervisor. (R. 1059A) Because Clowes received ratings of 2 or less in several performance categories, relating primarily to her documentation difficulties, a meeting was arranged between Clowes and Nurse Malloy to review her problems in these areas. Nurse Malloy met with Clowes on September 7, 1987 to discuss Clowes' unsatisfactory performance. (R. 344A, 844A) The meeting focused on the two areas in which Clowes exhibited the most difficulty: priority setting and documentation. While Nurse Malloy noted some improvement in Clowes' performance, it was determined that Clowes would be counseled for future problems in this area in a further effort to help her bring her performance as an IV Team nurse to acceptable standards. (R. 844A-847A, 1064A)

Despite the Hospital's efforts to help Clowes improve, her performance as an IV Team nurse again deteriorated. By October, 1987, a significant number of errors and deficiencies had been noted. Nurse Malloy began to receive unsolicited complaints from Clowes' fellow IV Team RNs about problems with Clowes' job performance. (R. 1066A) Clowes made significantly more documentation errors than the other IV Team nurses. (R. 874A) In light of these complaints and the existence of continued errors, Nurse Malloy met with Clowes on a number of occasions to discuss the deficiencies in Clowes' performance and documentation and to encourage her to improve these aspects of her work. (R. 1067A)

The complaints by the RNs with whom Clowes worked included incidents where Clowes failed to attend to irritated catheter sites and had to make multiple venapuncture or "stick" attempts when attempting to start an IV on her patients. (R. 1067A) Other employees reported that Clowes was still unable to set priorities and to function in an organized manner, which created staffing problems requiring other nurses to cover for Clowes. (R. 1067A) Still other employees complained of Clowes' inability to perform on busy days, to complete IV patient profiles, and to document IV patient catheter information and patient charts correctly. Also, Clowes misplaced records of certain patient saline flushes, thereby preventing the Hospital from being reimbursed for their costs. (R. 1067A)

Other examples of Clowes' performance problems on the IV Team included: on September 23, 1987, Clowes did not enter any dates on an IV patient profile for an IV tubing change. (R. 1067A) On October 8, 1987, Clowes did not document a patient catheter change nor did she correctly prepare a written catheter report. (R. 1067A) On that same day, Clowes did not record the insertion of a catheter on a patient's parenteral therapy sheet. (R. 1067A) On October 25, Clowes failed to enter the time or the patient's room number on a patient profile. (R. 1067A) In addition, for another patient, Clowes failed to report the use of a catheter cap and incorrectly documented a catheter dressing change report. (R. 1067A) As a result, none of this necessary medical information was properly available to subsequent medical care-givers for these many IV patients.

Again on October 28, Clowes incorrectly entered a patient's name on a written report. More importantly, an incorrect report required the reinsertion of a patient's IV push needle. (R. 1067A) In four other incidents on that date, incorrect entries were made by Clowes for the type of treatment she had administered to IV patients. Also, Clowes entered an incorrect date as to the time she had changed a patient's catheter. On yet another patient's chart, Clowes neglected to document the patient's room number. (R. 1067A)

On October 30, Clowes' reports for three separate IV patients were incomplete or incorrect. Finally, on November 3, it was discovered that Clowes again failed to document the date on which a patient's catheter was inserted and did not, contrary to standard, required procedure, initial the patient's dressing so if there was a problem or question she could be contacted. (R. 1067A) All of the foregoing, of course, potentially impacted on the patient care being rendered to these acutely ill patients by other hospital medical personnel who would rely on such information.

Because of these incidents and the numerous unsolicited complaints by her fellow employees, a conference was held with Clowes on November 5, 1987. Nurse Malloy and Patricia Coffman, a Nursing Department Supervisor, discussed with Clowes her work deficiencies and the complaints of her co-workers. (R. 850, 1066A)

It was determined at the conference that Clowes would submit a list of written goals for improvement to Nurse Malloy by November 11, 1987. (R. 1066A) Clowes was told that Nurse Malloy would monitor her IV Team

performance for one month and that they would discuss any problems found during that time. Nurse Malloy and Clowes were to meet on a weekly basis to review her performance. (R. 1066) Additionally, Nurse Malloy and Nursing Supervisor Coffman were to follow up with an evaluation of Clowes' progress on December 18, 1987. (R. 1066A) Finally, although the Hospital was going to great lengths to help Clowes improve her performance to acceptable standards, she was advised that if there was not significant improvement, further action might be taken. Clowes was not threatened with discharge or any other discipline at this time. After the November 5 conference, Clowes was upset and went home for the day. (R. 794A-803A, 1066A)

After the meeting on November 5, 1987, Clowes' performance as an IV Team nurse was more closely monitored to ensure that her IV patient care complied with acceptable standards and that she was attempting to improve. Despite the Hospital's extensive efforts and patience with Clowes, there still remained numerous inadequacies and inconsistencies in her documentation of patient IV information. On November 7, 1987, Clowes failed to record medication given to a patient. (R. 858A-859A, 1018A) The next day, Clowes incorrectly documented a patient's catheter site and had difficulty with her venapuncture technique. (R. 1018A) On November 10, 1987, Clowes failed to document a tubing change correctly and on November 12, 1987, she failed to remove a discharged patient's IV profile in a timely fashion. (R. 1018A)

Rather than providing objective evidence to refute these numerous performance shortcomings noted by

Nurse Malloy and others, Clowes relied at trial upon her subjective reactions to Malloy's efforts to improve her performance. Toward this end, Clowes presented a virtual catalogue of perceived mistreatment by Nurse Malloy: Nurse Malloy criticized her because of her performance shortcomings. (R. 186A, 191A) Nurse Malloy apparently criticized her in front of others. (R. 189A, 192A, 193A) Nurse Malloy repeated these criticisms on subsequent occasions. (R. 213A) Nurse Malloy allegedly would look for performance shortcomings, (R. 187A, 286A) and keep records of her needle stick attempts. (R. 198A) Nurse Malloy would treat her differently than others. (R. 188A) Clowes believed that Nurse Malloy inaccurately evaluated her. (R. 190A) It was Clowes' opinion that Nurse Malloy inaccurately assessed an event that Clowes acknowledged had occurred and for which Clowes received a written notice of deficiency. (R. 271A, 275A) Clowes also believed that Nurse Malloy treated her in a condescending manner, (R. 189A) and spoke to her rudely when Clowes misplaced a work slip. (R. 194A, 195A, 277A) Nurse Malloy told Clowes that others were complaining about her. (R. 189A, 191A-192A, 202A). Finally, Clowes believed that when Nurse Malloy and Nursing Supervisor Coffman reviewed her performance shortcomings at the November 5, 1987 conference, she was being harassed. Specifically, Clowes was upset that Nurse Malloy commented on Clowes' work on Floor 1C, because they had not worked there together. (R. 208A-210A)

In further support of her subjective perception that Nurse Malloy was "harassing" her, Clowes presented the testimony of her psychiatrist, Dr. Louis Hauber. Dr.

Hauber diagnosed Clowes' condition as a "major depressive disorder, single episode" and indicated that this was Clowes' first major depression. (R. 585A-586A) Dr. Hauber prescribed medicine to Clowes for her condition. (R. 583A)

Significantly, however, Clowes was unable to produce *any* evidence establishing that this alleged unfair treatment was because of her age. While Clowes claimed to have been treated differently than other members of the IV Team, including the many other IV Team nurses also over age 40, she offered no evidence that other members of the IV Team suffered from the same performance deficiencies. Moreover, while complaining that Nurse Malloy's evaluations were unfair, Clowes *admitted* that Ms. Malloy's evaluations contained numerous *positive* references to her work and admitted that Malloy's annual evaluation of Clowes' performance concluded that she had *satisfactorily* met the requirements of the position and recommended her for a salary increase. (R. 338A-344A)

On November 11, 1987, Clowes submitted a brief, handwritten list of goals designed to address her problems. (R. 804A, 1072A) Clowes never acted to implement these goals, however, since she took vacation from November 13 through 20, 1987. Beginning November 20, 1987, through December 22, 1987, Clowes requested that she be placed on sick leave. (R. 351A) Clowes never explained the nature of her illness to the Hospital, stating only that she was under a physician's care. During her sick leave, however, and while she was still being paid by the Hospital, Clowes began to work at the Concordia Nursing Home. (R. 351A)

Also on November 20, 1987, Clowes requested that she be transferred to temporary part-time status effective December 22, 1987 (the end of her sick leave) due to medical reasons. This request was granted by the Hospital. (R. 482A) Although the Hospital twice called Clowes to return to work in her part-time position, Clowes never returned to her position at the Hospital. (R. 351A, 353A)

At the time of Clowes' voluntary transfer to part-time status in November 1987, Clowes was under no threat of termination, demotion or formal discipline under the Hospital's progressive discipline system. (R. 810A) In fact, the Hospital was planning on a December meeting with Clowes to review her performance. (R. 1066A) Moreover, Clowes was not threatened with a loss of assignment or job responsibilities, nor was her pay cut. Indeed, Clowes' most recent evaluation had recommended an *increase* in her salary. (R. 1066a)

In addition, despite her allegations that Malloy was unfairly "harassing" her and subjecting her to intolerable working conditions, Clowes did not file a grievance under the Hospital's internal grievance procedure until months after her transfer to temporary part-time status. (R. 491A) Nor did Clowes present any evidence that she had requested a transfer off the IV Team prior to her voluntary change in status, or informed the Hospital that she would feel compelled to leave unless changes were made in the way she was supervised. Clowes simply abandoned her employment after accepting a job elsewhere.

In August, 1989, Clowes commenced her action against Allegheny Valley Hospital claiming that she was discriminated against and constructively discharged because of her age, in violation of the ADEA. Clowes also brought two pendent state law claims, one alleging age discrimination in violation of the Pennsylvania Human Relations Act and the other for intentional infliction of emotional distress. (R. 8A, 17A).

At the close of Clowes' case, the district court entered a directed verdict against Clowes dismissing her claim for intentional infliction of emotional distress. (R. 456A) Additionally, at the close of all the evidence, the district court chose not to entertain the pendent claim under the Pennsylvania Human Relations Act. (R. 950A) Therefore, the district court submitted only Clowes' ADEA claim to the jury. The jury returned a verdict by special interrogatories for Clowes. Specifically, the jury found that Clowes was constructively discharged from her employment with the Hospital and that age was a determining factor in the constructive discharge. (R. 124A-126A; 17a-18a) The Hospital filed a timely Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial. (R. 128A-133A) The district court summarily denied this Motion. (R. 124A)

Allegheny Valley Hospital filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit. In its brief to the Third Circuit, the Hospital urged the jury verdict be reversed because there was insufficient evidence as a matter of law to support the

findings that Clowes had been constructively discharged and that age was a determining factor in the discharge.[3]

On April 23, 1993, the Third Circuit issued its opinion, reversing the judgment of the district court. (1a-6a) An Order Amending Slip Opinion, in which the court clarified a portion of its original opinion, was filed on May 27, 1993. (7a-8a)

In reversing the judgment of the district court, the Third Circuit noted initially that an objective test must be applied in determining whether an employee was constructively discharged from employment. (11a) The court further noted that the appropriate standard for review of such questions of reasonableness was subject to dispute. Significantly, however, the court specifically held that it need not resolve that question in the present case for, applying any standard, the jury's finding that Clowes was constructively discharged could not be sustained. (12a)

In reaching its decision, the court took note of several important undisputed factual matters:

> We first note that Clowes cannot rely on many of the factors commonly cited by employees who claim to have been constructively discharged. Clowes was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire. Similarly, Clowes's employer did not demote her or

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[3] Allegheny Valley Hospital also argued that the district court had committed reversible error, requiring a new trial, by admitting testimony concerning the treatment of other employees. The Third Circuit never reached this issue.

> reduce her pay or benefits. Clowes was not involuntarily transferred to a less desirable position, and her job responsibilities were not altered in any way. She was not even given unsatisfactory job evaluations but merely received ratings of "fair."
>
> It is highly significant that Clowes, prior to leaving her position with the hospital, never requested to be transferred to another position, never advised the hospital that she would feel compelled to leave if changes regarding the manner in which she was being supervised were not made, and did not even attempt to file a grievance until long after she had stopped working at the hospital. . . . (12a-13a) (citations and footnotes omitted).

While specifically recognizing and accepting the jury's conclusions that Nurse Malloy had treated Clowes unfairly and that Malloy's criticisms of Clowes were not entirely warranted, (14a) the circuit court observed that "Clowes has not brought to our attention a single case in which a constructive discharge has been found based solely upon [allegedly overzealous] supervision." (13a) The court then recognized that to prevent improper use of the ADEA as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards, a discharge claim based solely on evidence of close supervision of job performance must be "critically examined." (13a) Based upon its examination of the evidence, the court held that "the evidence in this case was insufficient to show that Clowes was constructively discharged." (14a)

Clowes' petition for rehearing, and suggestion for rehearing *en banc*, was denied. (20a) Clowes, thereafter, petitioned this Court for a Writ of Certiorari to review the judgment and opinion of the court of appeals.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE PROPER STANDARD OF APPELLATE REVIEW FOR FINDINGS OF CONSTRUCTIVE DISCHARGE

Clowes' Petition for Certiorari is based primarily upon the existence of an alleged split among the circuit courts of appeal as to the proper standard of review to be applied to trial court findings of constructive discharge. This case, however, presents no such split. A review of the Third Circuit's opinion in this case, and in other cases involving constructive discharge, indicates that the Third Circuit has always applied the standard of review urged upon this Court by Clowes. Simply stated, no split exists between the holding of the Third Circuit in the instant case and the holdings of the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits[4] cited by

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[4] *Cozzola v. Codman & Shurtleff, Inc.*, 751 F. 2d 53, 56 (1st Cir. 1984); *Pena v. Brattleboro Retreat*, 702 F. 2d 322, (2d Cir. 1983); *Bristow v. Daily Press, Inc.*, 770 F. 2d 1251, 1252 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *Cortes v. Maxus Exploration Corp.* 977 F. 2d 195, 200 (5th Cir. 1992); *EEOC v. Delight Wholesale Co.*, 973 F. 2d 664, 669 (8th Cir. 1992); *Watson v. Nationwide Insurance Co.*, 823 F. 2d 360, 362 (9th Cir. 1987); *Hirschfeld v. New*

Clowes in her Petition for Certiorari. Petition for Certiorari (hereinafter "Cert. Petition") at 11-12.

A. The Unamended Preliminary Opinion Of The Third Circuit Has No Precedential Value

In its reported opinion, the Third Circuit specifically declined to answer the question now urged upon this Court by the Petitioner: what is the appropriate standard of review for trial court findings of constructive discharge? While acknowledging that some dispute exists concerning the proper standard of review for findings predicated upon an objective reasonable person test, (12a) the Circuit Court *specifically declined* to resolve that question in the present case and held, instead, that under any standard, the evidence presented by Clowes was insufficient as a matter of law to support the district court's judgment. (*Id.*) This Court should reject Clowes' disingenuous argument that the Third Circuit has resolved an issue, and created a split between the circuits, when the Third Circuit specifically, and unambiguously, declined to resolve that issue.

Clowes struggles mightily to create an issue for appeal where none in fact exists by relying *repeatedly* upon the circuit court's unamended and unreported April 23, 1993 slip opinion. Thus, while acknowledging that the amended opinion "ostensibly corrected [the Third Circuit's] standard of review error – or at least postponed it

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Mexico Corrections Dept., 916 F. 2d 572 (10th Cir. 1990); *Wardwell v. School Board*, 786 F. 2d 1554, 1557 (11th Cir. 1986).

for another day," Cert. Petition at 10, Clowes, nonetheless, maintains that "the opinion below aligns the Third Circuit with the Sixth Circuit as the only circuits to apply a *de novo* standard of review to constructive discharge claims." Cert. Petition at 11. Clowes, thus, urges this Court to grant her petition for certiorari to correct this perceived error "before other Circuits compound the error of the Sixth and Third Circuits and before other employment discrimination plaintiffs see their hard-won trial victories unfairly reversed." Cert. Petition at 9.

In their zeal to convince this Court to hear Clowes' case, counsel for the Petitioner have undoubtedly overstated the significance of the circuit court's initial unreported opinion. The unamended slip opinion of the court is not reported and, as such, is of *absolutely no* precedential value. *See* Chapter 5, IOP 5.6, Internal Operating Procedures of the United States Court Of Appeals For The Third Circuit. *See also U.S. v. Turley*, 891 F.2d 57, 60 (3d Cir. 1990). Nonetheless, Petitioner's counsel repeatedly cites to the unreported opinion, Cert. Petition at 9-11, and argues that the opinion constitutes a "holding that constructive discharge is a question of law, or at least a mixed question of law and fact, subject to *de novo* review in the appellate courts." Cert. Petition at 9. However, since the April 23, 1993, slip opinion is not published, and since the court of appeals specifically amended its opinion to clarify that it was *not* applying a *de novo* standard, there is absolutely no risk that litigants in the Third Circuit or elsewhere will be misled into applying the wrong standard of review to findings of constructive discharge. This Court, likewise, should not be misled into resolving an issue (*i.e.*, the proper standard

of review for findings of constructive discharge) that is not presented by the case *sub judice*.

Moreover, the fact that the circuit court issued an Order Amending Slip Opinion (7a-8a) prior to the publication of its final opinion is of no legal consequence. It is certainly within the court's discretion to amend an opinion prior to publication. Indeed, the slip opinions issued by this Court prominently contain a notice that "These opinions are subject to formal revision before publication in the preliminary print of the United States Reports." *See e.g.*, Opinions Announced June 28, 1993, 61 U.S.L.W. 4795 (June 28, 1993). For this Court to grant a petition for certiorari to review a circuit court decision which the circuit itself would not recognize as binding is certainly an ineffective use of the Court's resources. The Court should, therefore, decline Clowes' invitation to do so.

In sum, Clowes' misplaced reliance upon the unamended slip opinion and her misapprehension of the circuit court's Order Amending Slip Opinion, the Hospital submits, are insufficient bases upon which to grant a petition for writ of certiorari. We respectfully request, therefore, that the petition be denied.

B. In Other Published Decisions, The Third Circuit Court Of Appeals Has Applied The Standard Of Review That Petitioner Urges Upon This Court

Further undermining Clowes' perceived split between the circuits is the fact that the Third Circuit, in prior published cases, has clearly applied the standard of review which Clowes believes is correct. Interestingly, in

her lengthy string of citations concerning the appropriate standard of review, Cert. Petition at 12-13, Clowes does not cite these Third Circuit opinions, even though one of them is cited, with approval, in two of the decisions cited by Clowes. In both *Goss v. Exxon Office Systems Co.*, 747 F.2d 884 (3d Cir. 1984) – which is cited in the *Cortes v. Maxus Exploration* and *Bristow v. Daily Press* cases cited by Clowes – and *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747 (3d Cir. 1990), the court applied the "clearly erroneous" standard of review to the district court's findings of whether a constructive discharge had occurred. If, as Clowes argues, the Third Circuit has departed from this precedent and decided to apply a different standard of review to such determinations, it surely would have discussed, distinguished or overruled these prior cases. Indeed, in her Petition for Rehearing before the Third Circuit, Clowes argued precisely this point. The fact that the circuit court, *en banc*, declined Clowes' Petition for Rehearing is highly suggestive that the Court did not view the decision as a departure from its precedent. *See* Chapter 9, IOP 9.3.1, Internal Operating Procedure of the United States Court of Appeals for the Third Circuit.[5]

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[5] It is also significant that while allegedly aligning itself with the Sixth Circuit Court of Appeals, the Third Circuit neither cites nor discusses the two Sixth Circuit cases, *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) and *Wheeler v. Southland Corp.*, 875 F.2d 1246 (6th Cir. 1989), that Clowes argues apply an incorrect standard. Surely, if the court of appeals were overruling its own precedent and adopting the Sixth Circuit's view, the court would have, at the very least, cited these cases in support of such a holding.

Since the Third Circuit, both in the case at bar and in prior cases, has applied the standard of review which Clowes maintains is the only correct standard, no split exists between the Third Circuit and the other circuits cited in Clowes' petition. Thus, it is not necessary for this Court to grant the Petition for Certiorari in order to "correct" the decision of the Third Circuit.

II. THE COURT OF APPEALS' DECISION DID NOT DEPRIVE CLOWES OF HER SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Petitioner also seeks this Court's review arguing that the Court's guidance is necessary to curb the "disturbing lack of deference to jury verdicts and a willingness to reverse jury findings, particularly in employment discrimination cases" by the circuit courts. Cert. Petition at 14. Clowes contends that this appellate "second guessing of jury verdicts," Cert. Petition at 15, deprives her and other employment discrimination plaintiffs of their Seventh Amendment right to a jury trial.

Contrary to Clowes' alarmist arguments, it is clear that the Third Circuit did no more than exercise its responsibility to assure the fidelity of its judgment to the controlling law. This responsibility is imposed by the Due Process Clause of the Fifth Amendment. *See Galloway v. United States*, 319 U.S. 372 (1943).

Clowes does not dispute that the proper test for determining whether an employee was constructively discharged from employment is an objective test examining whether "the conduct complained of would have the foreseeable result that working conditions would be so

unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992); *Goss v. Exxon Office Systems*, 747 F.2d at 887-888.

The Third Circuit's decision did nothing more than measure the evidence presented at trial against this standard. Contrary to Clowes' argument to this Court, Cert. Petition at 9, 11, the Third Circuit did *not* overrule the jury's credibility resolution and credit Malloy's testimony over Clowes' testimony. In fact, the court of appeals specifically recognized and accepted the jury's apparent conclusions that "Malloy treated Clowes unfairly and that her criticisms of Clowes were not entirely warranted." (14a) The court further noted, however, that Clowes had relied heavily on evidence regarding the subjective impact that the events in question had on her. (13a) The court properly disregarded such evidence, since, as the court noted, " 'the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.' " (13a-14a) (quoting *Gray v. York Newspapers, Inc.*, 957 F.2d at 1083)

Examining the record evidence in the exercise of its constitutional duty, the court listed a host of *undisputed* facts surrounding Clowes' decision to leave employment. Thus, the court noted that Clowes was never threatened with discharge nor did the Hospital ever urge or suggest that she resign or retire. The Hospital did not demote Clowes or reduce her pay and benefits. Clowes was not involuntarily transferred to a less desirable position and her job responsibilities were not altered in any way. Indeed, Clowes was not even given unsatisfactory job evaluations but merely received ratings of fair. (12a) The

court also found it highly significant that Clowes, prior to leaving her position, never requested to be transferred to another position or advised the Hospital that she would feel compelled to leave if changes were not made in the manner in which she was being supervised. As the court noted, since Clowes' complaint focused exclusively on the actions of one supervisor, it was significant that Clowes did not even request a transfer before deciding to resign. (13a n.6)

Thus, while specifically declining to decide the issue of the appropriate standard of review for a trial court finding of constructive discharge, the Third Circuit held that under any standard of review, the evidence adduced by Clowes at trial was "insufficient to show that Clowes was constructively discharged." (14a) In reaching this conclusion, the court certainly did not usurp the jury's proper function and deny Clowes her Seventh Amendment right to a jury trial. Rather, the court exercised its constitutional responsibility to assure the fidelity of its judgment to the controlling law. The circuit court's exercise of its oversight responsibility was not constitutionally infirm and, therefore, should not be disturbed by this Court.

CONCLUSION

For the reasons set forth above, Respondent Allegheny Valley Hospital respectfully requests the Court to deny the Petition for Writ of Certiorari of Janet G. Clowes.

Respectfully submitted,

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